BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT E. THOMAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,066,017
GENERAL MOTORS, LLC	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the October 9, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for the claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 11, 2013, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's request for benefits after finding claimant failed to file a timely application for hearing, pursuant to the plain language of K.S.A. 44-534(b) Furse 2000.

Claimant appeals, arguing his application for hearing was timely filed, as the Kansas Supreme Court has found K.S.A. 44-557(c) Furse 2000 prevents the limitation of time contained in K.S.A. 44-534(b) Furse 2000 from beginning to run unless a report of the accident as provided in that section has been filed, thus delaying the commencement of the time limitation. Claimant contends the three-year limitation was not abolished, but the start is merely suspended when the accident report is not timely filed. Claimant would also

like the Board to order respondent to authorize medical treatment and to order reimbursement of $350 in unauthorized medical benefits.

Respondent argues that ALJ's Order should be affirmed.

The issues are as follows:

1. Was claimant's application for hearing was timely filed?

2. Is claimant entitled to authorized medical treatment and reimbursement for unauthorized medical expense?

FINDINGS OF FACT

Claimant had been working for respondent for 20 years, when on June 22, 2010, he felt a pop in his back while moving boxes of air bags to a workstation. Claimant testified that he had been reaching above his head to bring a box of air bags down to the floor and when he bent over he felt the popping sensation in his back. He informed his supervisor of the incident and received a pass to be checked out at respondent's medical clinic. While in the clinic, claimant was treated by Jesse W. Cheng, M.D. An injury report was filled out and claimant was provided with an ice wrap for his low back.

Claimant was returned to full duty and instructed to come back throughout the rest of his shift when possible. Claimant returned for another ice treatment on June 24, 2010, two days later. This was claimant's last documented treatment before the 2013 flare-up discussed below. Claimant testified he continued to have ongoing problems with his low back. On a good day, his discomfort was 1 out of 10. When he had a flare-up, which he testified happened every two or three months, it would be difficult for him to walk and the pain would go down through his pelvic region into his leg.

Claimant suffered a flare-up in 2013, returning to Dr. Cheng on June 6, 2013. He testified that he did not do anything at work or outside of work to cause the flare-up. His current symptoms included pain and difficulty going from a sitting to a standing position and vice versa. He also had a tingling sensation in his legs. Claimant admits to having problems with his back before June 22, 2010, undergoing an MRI at the end of 2009. Claimant was diagnosed with a lumbar sprain at that time. He testified he had not missed any work before June 2013, because his flare-ups had always occurred close to a weekend. He was able to recoup during that time off and then could return to work.

Claimant had an x-ray taken on June 6, 2013, at the request of Dr. Cheng. Following this x-ray, claimant was told he had degenerative disc disease in his back. Despite having nonstop pain in his back for three years after the accident, claimant did not seek additional treatment until June 6, 2013. Claimant sought medical treatment at this time because the pain had become bad enough that he was unable to work for 4 days.

After this absence, claimant was required to be checked out by plant medical before returning work. Claimant reported to Dr. Cheng that his back started getting worse in the fall of 2012, while he was working a die-setting job. He had pain, tightness and stiffness in his back while working in respondent's body shop in March 2013. Until June 6, 2013, claimant did not go to respondent's medical clinic, nor did claimant report any additional low back injury or flare-up to respondent.

Claimant admits that he was in plant medical for treatment of a shoulder injury between 2010 and 2013, and during those visits he did not mention his low back pain. Claimant's benefits for the back pain were suspended on June 17, 2013, and he was no longer allowed to speak with plant medical.

Claimant filed his application for hearing with the Division on July 3, 2013, citing a date of accident of June 22, 2010. Claimant continues to work full duty for respondent.

Claimant met with Dr. Edward Prostic, on August 16, 2013, at the request of his attorney. Claimant reported pain across his low back with some radiation down the posterior right thigh to the knee, with episodic paresthesias, and prior left leg pain. He reported the pain being worse with changing positions from sitting to standing and with bending, squatting, twisting and lifting.

Dr. Prostic opined claimant had degenerative disc disease and instability at L5-S1, from repetitious minor trauma and a specific accident on June 22, 2010. He felt conservative treatment was appropriate until claimant's neurologic symptoms worsen. Dr. Prostic also felt the work-related trauma on June 22, 2010, was the prevailing factor for claimant's injury, the medical condition and current need for medical treatment.

Claimant met with Dr. Chris Fevurly on October 1, 2013, for an examination at respondent's request. Claimant had complaints of back pain and occasional right posterior thigh tingling. Dr. Fevurly examined claimant and diagnosed chronic low back pain without current evidence for lumbar radiculopathy or spinal stenosis, present since 2008 and aggravated by claimant's demanding work activity. He also found advanced degenerative disc changes and grade I anterolisthesis of L5 on S1.

Dr. Fevurly opined that the prevailing cause of the mechanical low back pain was related to the underlying moderately severe degenerative changes throughout claimant's lumbar spine. He opined the degenerative changes occurred as a natural consequence of living and aging and are not the result of claimant's job duties. Dr. Fevurly found claimant did not have a rateable permanent impairment to the lumbar spine as a result of the work-related injury. He did not assign any restrictions, stating claimant needs to decide if he can cope with the essential functions of respondent's various production line jobs. He went on to find that claimant may want to pursue further testing or treatment through his own health plan in regard to management of the mechanical low back pain. Dr. Fevurly felt the need for treatment is not related to a work-related injury or condition.

This matter went to preliminary hearing before the ALJ on October 9, 2013, at which time claimant was denied benefits for having failed to comply with the filing requirements of K.S.A. 44-534(b), as claimant's application for hearing was filed more than three years from the date of accident or two years from the last payment of compensation. The Order of the ALJ was affirmed by this Board Member in a December 19, 2013, Order.

In a letter dated October 25, 2013, Dr. Prostic opined claimant's reported exacerbations and remissions of back and thigh difficulties are the natural and probable consequence of his work-related injury to the low back while working for respondent and for which he saw claimant on August 16, 2013.

A second preliminary hearing was held before the ALJ on December 11, 2013, at which time the ALJ again denied claimant's request for benefits, citing claimant's failure to timely file his application for hearing. The ALJ cited *Nilges*[1] noting that it doesn't matter that the employer was required to file an accident report. The ALJ determined that the plain language of K.S.A. 44-557 is that the time limit is suspended "unless" an accident report is filed, not "until" an accident report is filed. He then reasoned the time limits for filing an application for hearing were in effect before the application was filed. Therefore, the application filed by claimant was still untimely.

At the December 11, 2013, preliminary hearing, claimant provided the Workers Compensation System Accident Report Lookup Screen for the court's review. The report recorded the filing date of respondent's accident report for the June 22, 2010, accident as June 10, 2013.[2]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-557(a)(b)(c) Furse 2000 states:

> (a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

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[1] *Nilges v. State*, 46 Kan. App. 2d 888, 266 P.3d 587 (2011).

[2] P.H. Trans. (Dec. 11, 2013), Cl. Ex. 1 at 8.

> (b) When such accident has been reported and subsequently such person has died, a supplemental report shall be filed with the director within 28 days after receipt of knowledge of such death, stating such fact and any other facts in connection with such death or as to the dependents of such deceased employee which the director may require. Such report or reports shall not be used nor considered as evidence before the director, any administrative law judge, the board or in any court in this state.
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> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

The ALJ discusses the Court of Appeals case of *Nilges,* above cited. However, the issue in *Nilges* involved the question of whether an employer, who had notice of an accident, but failed to file an accident report, even when not required, would cause the filing time for a claimant to extend to one year instead of the normal 200 day limit specified in the statute. That is not the question presented here.

In this instance, the question is whether the statutory time limits of K.S.A. 44-557 Furse 2000 would run from the date of accident, once an accident report is filed by the employer, even when the employer's accident report is filed beyond the time limits allowed by statute. This question was not addressed by *Nilges.*

A case more on point, dealing with this specific question is *Childress.*[3] In *Childress,* a worker was accidently killed on March 27, 1974. The employer had notice of the accident, but failed to file an accident report for 79 days, beyond the time limit allowed by statute. Within 6 months, the widow commenced a proceeding before the director by serving a claim for compensation upon the employer, but failed to file an application for hearing until June 30, 1977, which is more than three years after the employer filed the report of accident. The Court of Appeals, in *Childress,* found the employer's failure to file the report within 28 days as required by K.S.A. 1978 Supp. 44-557(a) abolished all statutory time limits. The Kansas Supreme Court, in denying benefits to the widow, analyzed K.S.A. 1978 Supp. 44-534(b) and K.S.A. 1978 Supp. 44-557, and held:

> Section 44-534(b) is a three-year statute of limitation contained within the Kansas Workmen's [sic] Compensation Act. § 44-557(c) prevents the limitation of

[3] *Childress v Childress Painting Co.*, 226 Kan. 251, 597 P.2d 637 (1979).

> time contained in § 44-534(b) from *beginning to run* "unless a report of the accident as provided in this section [44-557] has been filed."
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> "A report of the accident as provided in this section" clearly refers to a "report . . . upon a form . . . prepared by the director." § 44-557(c) says "unless a *report . . . as provided in this section* has been filed." (Emphasis supplied.) The Court of Appeals' interpretation, it seems to us, would read the language as saying "unless a report . . . has been *filed as required in this section."*
>
> § 44-557(c) prevents the limitation from *beginning to run,* and thus *delays* the commencement of the time limitation; it does not *abolish* the three-year limitation period but merely *suspends* the start of the period when an accident report is not timely filed . . . Upon examination of the language employed in K.S.A. 1978 Supp. 44-557(c) we hold that section of the statute merely tolls the limitation provided by § 44-534(b) until such time as an accident report is filed.[4]

In *Childress,* the Court determined that no application for a hearing was filed within the three-year period commencing on June 13, 1974, *the date on which the employer filed a report of the accident with the director. The application was filed beyond the expiration of the three year period beyond that filing date, and came too late. (*Emphasis added)

Here, the employer's report of accident was not filed until June 10, 2013. Therefore, based upon *Childress,* the statute of limitations, which was merely delayed, not abolished, did not begin to run until the filing date. Therefore, claimant's application for hearing, filed July 3, 2013, was timely.

Regarding claimant's second issue, not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[5]

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[4] *Id.* at 253-254.

[5] K.S.A. 2012 Supp. 44-534a(a)(2).

Claimant also requests the Board provide authorized medical treatment and reimbursement for unauthorized medical expense. However, the ALJ did not rule on either of those issues. The Board is limited under K.S.A. 2009 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The Board's jurisdiction on an appeal from a preliminary hearing is controlled by statute. The Board does not take original jurisdiction on any issue, especially when that issue has not been addressed by the ALJ. Claimant's request for review of authorized medical treatment and unauthorized medical expenses is denied. Those issues are better served presented to the ALJ.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Based upon the Supreme Court's logic in *Childress,* the Order of the ALJ is reversed, as claimant's application for hearing was timely filed within three years of the filing of the employer's report of accident under K.S.A. 44-534(b) Furse 2000 and K.S.A. 44-557(c) Furse 2000.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 11, 2013, is reversed and the matter remanded to the ALJ for further proceedings consistent with this opinion.

[6] K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge